UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-20424
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

AIGBE ERHINMWHIN GODFREY, a/k/a
Vernon R. Cotlong, a/k/a Richard Carr,
a/k/a Godfrey E. Aigbe, a/k/a Godfrey Abe,
a/k/a David Taylor,

Defendant-Appellant.

Appeal from the United States District Court
For the Southern District of Texas
(CR-H-93-0148-1)

(September 25, 1995)

Before THORNBERRY, JOLLY, AND BENAVIDES, Circuit Judges:

PER CURIAM:[*]

Appellant Aigbe Godfrey was convicted by a jury of making a false application for a passport, possession of false identification documents with intent to defraud the United States, use of false social security cards, bank larceny, use of false documents in connection with a Veteran's Administration ("VA")

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

loan, possession of a firearm by a felon, and possession of stolen mail matter. He brings several challenges to his convictions and sentences. We affirm.

I. Background

Godfrey first came to the attention of federal law enforcement authorities in March 1992, when he attempted to obtain a passport in the name of Vernon Rogers Cotlong. State Department investigators, upon learning "Cotlong" was actually Godfrey, obtained arrest and search warrants for Godfrey and his townhouse in Houston. When the warrants were executed in April 1993, a combined state and federal law enforcement task force found Godfrey and his wife Natalis Taylor inside the house, along with numerous fraudulent identification documents and related items. Officers seized the following items: a camera and materials usable for making ID cards; a nine millimeter pistol with a loaded magazine nearby; a shredder containing torn pieces of credit cards and drivers' licenses; VA documents in the name of David Taylor, including a loan application for Godfrey and Natalis; a blank Virgin Islands birth certificate; a social security card and student ID card in the name of David Taylor; and a receipt for a storage unit and an addendum storage contract in the name of Robert Bailey.

A search of the U-Haul storage unit revealed almost four thousand counterfeit Texas drivers' license receipts, about one hundred counterfeit Savings of America cashier's checks, a check

printer, several checkbooks in the names of Godfrey and Natalis Taylor, blank Texas Southern University ID cards, credit cards in various names, photographs of Godfrey, and other items. A manager of the U-Haul company identified Godfrey in open court as the person to whom he had rented the storage unit under the name of Robert Bailey.

Godfrey was charged in a fourteen count indictment with the above referenced offenses, and after conviction, he received sentences of seventy-five months for each of the five counts of bank larceny, and sixty months on each of the seven remaining counts, all running concurrently.[1] A supervised release term of three years was imposed as well as restitution in the amount of $12,657.07. In this appeal he complains his in-court identification by certain witnesses was overly suggestive, attacks the sufficiency of the evidence to support the convictions, and raises various challenges to his sentences.

II. In-Court Identification

Godfrey first asserts that the district court erred in allowing the prosecutor to ask witnesses to identify him, directing their attention to his presence in the court room. He asserts this procedure was impermissibly suggestive because it gave rise to a substantial likelihood of misidentification.

[1] Godfrey was also charged with falsely representing himself as a United States citizen, of which he was acquitted.

Godfrey's complaints as to six specific witnesses is that the prosecutor pointed him out to the jury and asked whether they had ever met him. For example, Elias Lozano was asked "Now, let me direct your attention to the gentleman who is seated over at defense counsel table. Have you ever met this gentleman before that you can recall?" Lozano answered no, and than stated that he never gave Godfrey permission to possess credit cards in Lozano's name, and which Lozano had not received. The other five witnesses were asked similar questions and all testified they had never met Godfrey or given him permission to use their names to obtain credit cards or open bank accounts.

These questions were not improper. They were not leading in the sense of suggesting any particular answer, and did not "give rise to a very substantial likelihood of irreparable misidentification," because none of the witnesses identified Godfrey. Simmons v. United States, 390 U.S. 377, 384, 88 S.Ct. 967, 971 (1968). They simply stated they did not know him.

Godfrey also complains of questions asked of two bank employees, who identified him in court as the person whom they had assisted in either opening or using the fraudulent checking accounts. The record reveals these witnesses were asked non-specific questions, such as, "Do you see the person in the courtroom that you met with . . .?" Although Godfrey's attorney made a belated protest "that by pointing out him, Mr. Godfrey, that that signals to the witness to identify Mr. Godfrey here in court," we do not find these questions objectionable. The exact manner of

the in-court identification is discretionary with the district court, and generally, the question of the suggestiveness or credibility of the identification is best resolved by the jury after the defendant has had an opportunity to test the accuracy of the identification through cross-examination. *See* United States v. Davies, 768 F.2d 893, 904 (7th Cir.), *cert. denied*, 474 U.S. 1008 (1985). Here, Godfrey's attorney vigorously cross-examined these witnesses regarding their identification, and raised no complaint other than the above protest, which, if construed as an objection, was made on the third day of trial and thus was untimely. We hold the questions here did not give rise to a substantial likelihood of irreparable misidentification, and there was no error, plain or otherwise in allowing the questions. Simmons, *supra*.

III. Sufficiency of the Evidence

Godfrey asserts the evidence is insufficient to support his convictions for bank larceny because there was no evidence demonstrating he was the person who had accessed various automatic teller machines ("ATM").[2] None of the government witnesses could testify who had accessed the ATMs, or even how they were accessed. Therefore, he asserts his motion for judgment of acquittal should have been granted. We disagree.

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[2] Godfrey also attacks as insufficient the evidence to support his convictions for unauthorized use of credit cards and possession of stolen mail. However, because he has failed to brief his claims as to either of these convictions, they are deemed abandoned. *See* Weaver v. Puckett, 896 F.2d 126, 128 (5th Cir.), *cert. denied*, 498 U.S. 966 (1990).

After the government had completed its case in chief, Godfrey moved for a judgment of acquittal pursuant to FED. R. CRIM. P. 29. However, since he did not renew the Rule 29 motion after the close of all the evidence, he has waived any objection to the motion's denial. United States v. Shannon, 21 F.3d 77, 83 (5th Cir.), *cert. denied*, 115 S.Ct. 260 (1994). This Court's review as to whether the evidence was sufficient to support the convictions becomes limited to whether there has been a "manifest miscarriage of justice," i.e., "if the record is devoid of evidence pointing to guilt." United States v. Singer, 970 F.2d 1414, 1418 (5th Cir. 1993)(internal citations and quotation marks omitted).

"In evaluating the sufficiency of the evidence, we consider the evidence in the light most favorable to the government with all reasonable inferences and credibility choices made in support of the verdict." United States v. Ivy, 973 F.2d 1184, 1188 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1826 (1993). Neither the jury nor the reviewing court is required to examine each piece of evidence in isolation; items of evidence which would be inconclusive if considered separately may, upon being considered in the aggregate, constitute conclusive proof of guilt. *See* United States v. Lechuga, 888 F.2d 1472, 1476 (5th Cir. 1989).

In a prosecution for bank larceny, the government is required to prove the following elements: (1) the taking and carrying away of money, property, or anything of value; (2) in an amount of more than one hundred dollars which was in the custody or possession of the bank, and; (3) which the defendant intended to steal or

purloin. United States v. Goldblatt, 813 F.2d 619, 625 (3d Cir. 1987); 18 U.S.C. § 2113(b). The statute "encompasses and proscribes the taking of money from a bank by false pretenses." United States v. Johnson, 706 F.2d 143, 144 (5th Cir.), *cert. denied*, 463 U.S. 1212 (1993). "The taking and carrying, therefore, can be accomplished simply by withdrawing funds from a bank pursuant to a scheme to defraud." Goldblatt, *ibid*.

Our review of the record reveals there was ample evidence to show Godfrey had committed bank larceny as alleged in counts five through nine of the indictment, which indicated that Godfrey had stolen money from Houston area banks assuming the identities of Wibawa Sutanto, Makonnen Taye, Freddie Hurrington, Danny Clark, and Johnny Winston. Godfrey's *modus operandi* was similar in each of the five offenses. He first rented mailboxes in each of these individuals' names from a commercial mailbox business located in Houston. He then went to a bank and opened an account in one of these persons' names using fraudulent identification. The addresses and apartment numbers furnished to the bank and imprinted on the checks sent him for the accounts were really those of the commercial rental boxes. The operator of Mail-A-Box identified Godfrey as the person who attempted to rent five mailboxes from him, and then later brought in five individuals to rent the boxes.

Employees at several Houston area banks identified Godfrey as the person who opened checking accounts in the names of the above individuals and who later deposited counterfeit cashiers' checks into each account. The serial numbers of four of the fraudulent

cashiers' checks were identical, and all five were for slightly less than $5,000. Bank employees testified that each bank lost between $100 and $5,000 as a result of ATM withdrawals and checks drawn on the accounts. Sutanto, Taye, Hurrington, Clark, and Winston all testified that they did not know Godfrey, had never had accounts at the banks in question, and had never rented a mailbox.

To sum up, in all five cases Godfrey opened bank accounts using false identification. He then deposited counterfeit cashier's checks in each account and proceeded to withdraw money from the accounts, either via an ATM or fraudulent checks. Viewed in the light most favorable to the prosecution, we hold the evidence is sufficient to support the convictions.

IV. Sentence

Godfrey's remaining complaints are directed toward the sentencing phase of the trial. He first asserts the district court erred by finding that he intended to defraud the VA of $62,000, the face value of the home loan tentatively approved for himself and Natalis. Count 12 was based on the fraudulent statements they made in applying for the loan. Godfrey asserts he did not intend to defraud the VA because he intended to repay the loan.

The pre-sentence report ("PSR") recommended using the $62,000 in the amount of loss to victims in the counts in Group 1, making the total loss for this group more than $70,000, and increasing the group offense level by six levels. U.S.S.G. § 2F1.1(b)(1)(G). The actual loss was $12,000, which would have increased the offense

level by only three levels. U.S.S.G. § 2F1.1(b)(1)(D). Counting only this actual loss, the offense level for Group 1 would have been 11, not 14, but the total offense level for all counts still would have been 17. U.S.S.G. § 3D1.4(a).

At sentencing, the district court found that even if the increase should only be three levels, not six, there were grounds for an upward departure because the offense involved "a crime the severity of which was not taken into account by the guidelines." The crime referred to by the court was Godfrey's attempt to obtain a fraudulent extension of credit, namely a $62,000 VA loan. "If both the actual loss and intended loss approach zero, the district court may choose to exercise its discretion and depart upward from the sentence range calculated under the Guidelines." United States v. Henderson, 19 F.3d 917, 928 at n. 12 (5th Cir.), *cert. denied*, 115 S.Ct. 207 (1994). The district court stated adequate reasons for departing upward and therefore, did not abuse its discretion in factoring the $62,000 into its calculation of the offense level for Group 1.

Godfrey next asserts the district court erred by denying him a six-level reduction relative to his conviction on Count 13, possession of a firearm by a felon. He contends he is entitled to the reduction because he possessed the nine millimeter semiautomatic pistol found in a drawer in his upstairs bedroom "solely for lawful sporting purposes." U.S.S.G. § 2K2.1(b)(2). The pistol was not loaded, but there was a loaded magazine beside it.

Godfrey does not suggest what his "sporting purpose" was nor did he introduce any evidence to support this contention at the sentencing hearing. At trial, he denied possessing the gun, claiming it belonged to someone else. Later he told the probation officer that it belonged to Natalis and that she possessed it "solely for collection." At the sentencing hearing, counsel argued "sporting purposes or for collection," but Godfrey asserted he was not a "prohibited person" so the offense level should have been 12. § 2K2.1(a)(7).

Section 2K2.1(a)(6) provides for a base level offense of 14 for possession of a firearm by a "prohibited person," which includes convicted felons. Section 2K2.1(b)(2) provides that if the possession was "solely for lawful sporting purposes or collection," the offense level would be six, eight levels less.

The district court found that the PSR correctly stated the offense level as 14, "given the nature of the weapon, the absence of any apparent sporting purpose [or] any other indication of firearm collection for sport or other recreational purposes." We hold the sentence was based on a factual determination supported by the record and, as such, is not clearly erroneous. *See* United States v. Buss, 928 F.2d 150, 152 (5th Cir. 1991).

In his next complaint, Godfrey asserts the district court erred in departing upward from the Guideline range. He specifically objects only to a letter found in his residence from his brother discussing a scam to get people to invest in a bogus oil deal in Nigeria. Godfrey complains this letter was hearsay and

its contents were misinterpreted. He fails to mention that no objection was ever lodged at sentencing.

The district court may make an upward departure if reliable information indicates the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that he will commit other crimes. U.S.S.G. § 4A1.3. The court must state its reasons for the upward departure, 18 U.S.C. § 3553(c)(2), and the court's decision is reviewed under an abuse of discretion standard. United States v. Ashburn, 38 F.3d 803, 807 (5th Cir. 1994)(en banc), *cert. denied*, 115 S.Ct. 1969 (1995). This Court will "affirm a departure from the Guidelines if the district court offers acceptable reasons for the departure and the departure is reasonable." *Ibid.* (citations and quotation marks omitted).

Under the Guidelines, Godfrey's offense level was seventeen and his criminal history category was six. The district court departed upward to level nineteen, which has a sentencing range of 63 to 78 months. The court, adopting the data stated in the PSR, explained in detail the reasons for its departure. The court found that Godfrey's criminal history category "does not adequately represent the likelihood of other crimes that may be committed, nor does it adequately reflect the seriousness of [his] past criminal record." The court noted without any objection or rebuttal that Godfrey and his "brother were developing a scheme in which to extort money for a series of fraudulent investments, which was just in the planning stages." The district court may adopt the facts

set forth in the PSR without further inquiry if they have an adequate evidentiary base and the defendant does not present rebuttal evidence. United States v. Valencia, 44 F.3d 269, 274 (5th Cir. 1995).

The court explained that she was "departing upward the number of levels necessary to impose the sentence" of 75 months, which was an upward departure of twelve months. This, along with the court's other remarks, adequately explained the reasons for departure with no need to advert to offense level 18. Ashburn, 38 F.3d at 809. We hold the departure was reasonable under the circumstances, and therefore, no abuse of discretion is shown.

Godfrey next contends the district court erred by increasing his offense level from 14 to 17 based on grouping of the counts into three groups. He asserts count 13, the firearm possession count, should have been grouped with the other counts instead of grouping it by itself because it involved substantially the same harm as did the others. The counts were grouped by the PSR into three groups, which added up to two and one-half units, and required the addition of three levels to the highest offense level of any of the convictions. U.S.S.G. §3D1.4(a) & (b). If count 13 had been added to one of the other groups, there would have been only two units, and the offense level would have been raised by only two levels.

Section 3D1.2 provides that "[a]ll counts involving substantially the same harm shall be grouped together into a single Group." Counts involve the same harm if they involve the same

victim and the same transaction, the same victim and transactions which are part of a common scheme or plan, or when one count "embodies conduct that is treated as a specific offense characteristic" in the guideline applicable to one of the other counts. § 3D1.2(a) through (c). Counts are also grouped if the offense level is based on some "measure of aggregate harm, or if the offense level is ongoing or continuous in nature." § 3D1.2(d).

Keeping the above discussion in mind, we do not believe count 13 involves substantially the same harm as do the other counts. Only his conviction under count 13 "protects society against those determined unqualified to possess firearms," *see* United States v. Barron-Rivera, 922 F.2d 549, 555 (9th Cir. 1991), and there is no evidence that the firearm was involved in the commission of the other offenses. The district court did not abuse its discretion in adopting the PSR as to the grouping of counts.

Godfrey next contends the district court erred in failing to consider his financial status before imposing restitution and to make findings of fact as to whether the banks had received or would receive compensation for their losses. The district court found Godfrey did not have the ability to pay a fine, but ordered him to pay restitution in an amount of $12,657.07, in installments to commence thirty days after the judgment, as recommended by the PSR.

Godfrey made no objection regarding restitution, and so he has waived this complaint. *See* United States v. Ruiz, 43 F.3d 985, 991 (5th Cir. 1995). Furthermore, the record reflects the court did consider his financial condition by finding he could not pay a fine

and by adoption of the PSR, which discussed his financial situation and showed he was in good health, had attended college, and had been gainfully employed. Because the record provides an adequate basis for review of the district court's restitution order, the court did not need to assign specific reasons for its decision to order full restitution. United States v. Patterson, 837 F.2d 182, 183-84 (5th Cir. 1988). No error, plain or otherwise is shown.[3]

As his final contention Godfrey complains that the district court was collaterally estopped from ordering his deportation because the jury found him not guilty of having falsely represented himself to be a United States citizen, as charged in Count 2 of the indictment. He testified at trial that he was a citizen because he was born in the Virgin Islands.

At trial there was no testimony, other than Godfrey's, that he was born in the Virgin Islands. When Godfrey applied for his social security card he presented a document which foreigners are required to fill out and give to the Immigration and Naturalization Service. Texas Department of Public Safety records list his place of birth as Benin, Nigeria.

At the sentencing hearing the government moved for Godfrey's deportation, and introduced into evidence four certified documents attesting that the Virgin Islands government had no record of his birth. The PSR listed his citizenship as Nigerian.

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[3] If the victim banks have been or will be compensated by insurance, payment of restitution to the insurer can be ordered. *See* United States v. Mitchell, 876 F.2d 1178, 1183-84 (5th Cir. 1989).

18 U.S.C. § 3583(d) authorizes the district court to deport an alien as a condition of supervised release. An alien who has been convicted of a crime involving moral turpitude, and for which a sentence of one year or more was assessed is deportable. 8 U.S.C. § 1251(a)(2)(A)(i) (Supp. 1995).

Acquittal of a criminal charge does not bar a civil action by the government based on the same facts because an acquittal is nothing more than a determination that the evidence was not sufficient to overcome all reasonable doubt of the defendant's guilt. United States v. One Assortment of 89 Firearms, 465 U.S. 354, 359, 104 S.Ct. 1099, 1103 (1984). In the sentencing proceeding, the district court needed only to find facts relative to Godfrey's deportability by a preponderance of the evidence. *See* United States v. Mergerson, 4 F.3d 337, 343-44 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 1310 (1994).

The district court's findings of fact are reviewed under the "clearly erroneous" standard. United States v. Alfaro, 919 F.2d 962, 965-66 (5th Cir. 1990). The record contains ample evidence to support the court's finding that Godfrey was born in Nigeria rather than the Virgin Islands. Accordingly, the district court did not err by ordering his deportation.

V. Conclusion

We find no merit to any of Godfrey's contentions. Therefore, the judgments and sentences are AFFIRMED.